



G-Men Run Amuck The 287(g) Men and Immigration Law

BY EVELYN H. CRUZ & ROBERT J. MCWHIRTER

Don't shoot, G-Men; don't shoot, G-Men!"

So cried gangster "Machine Gun" Kelly with hands up when the Feds arrested him in 1933—at least that's the version from *THE FBI STORY* with Jimmy Stewart.¹ After that, every kid in America wanted to be a "G-Man"!

Now, theoretically, every cop in America can enforce immigration law and be a "G-Man" too—specifically a "287(g) man."

In 1996, Congress passed 8 U.S.C. § 1357(g), aka "287(g)," allowing Immigration and Customs Enforcement (ICE):

[t]o enter into written agreements under which state or local enforcement agencies may perform, *at their own expense and under the supervision of ICE officers*, certain functions of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States.³

Nationally, the Feds spent \$60 million from 2006 to 2008 to train, supervise and equip 67 local police agencies.⁴ For FY 2009, ICE received \$54.1 million.⁵ Yet, aside from training costs, none of this money goes to local police under the 287(g) program. For the Feds it is a great deal, or, in cop parlance, a "force multiplier," to have state cops enforce federal immigration law, with local counties and police departments paying the rest of the bill: officer salaries, health care, benefits and time.⁶

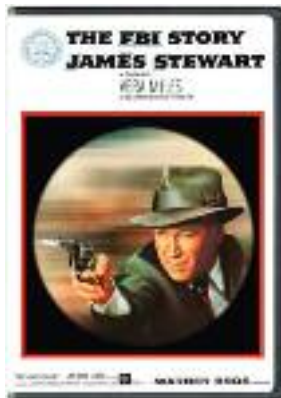
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So, why would local law enforcement, like Maricopa County, want to have its taxpayer dollars enforce a federal crime? It makes good press.⁷

A Little History

Even before Congress passed 287(g) in 1996, the legal and policy questions of whether state and local police could enforce federal immigration law were debated. Most experts agreed that state, tribal and local police had some inherent authori-



1. *The FBI Story* (Warner Bros. 1959)

Immigrant Responsibility Act of 1996 (IRA/IRA Public Law 104-208).

The designation "287(g)" comes from the numbering of the Immigration and Nationality Act (INA), where 8 U.S.C. § 1357 corresponds to INA 287(g).

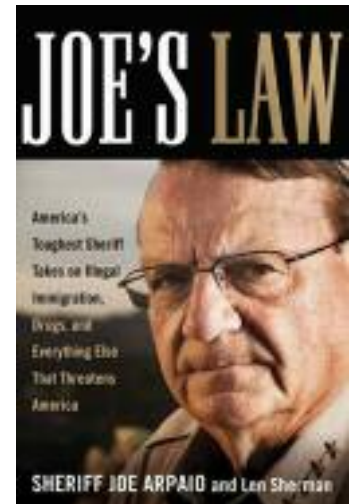
3. 8 U.S.C. § 1357(g). See also GAO-09-109 Management Controls for 287 Program, Jan. 2009, at 7 (added emphasis). Local cops also can tap into the ICE database to issue a Notice to Appear (NTA) to start deportations and can participate in federal criminal task forces.

4. GAO-09-109 Management Controls for 287 Program, *supra* note 3, at 10.

5. *Id.* at 9.



6. Not to mention the cost of housing all these essentially federal offenders in the county jails. As part of the ad campaign, the Sheriff posts that no person without documentation can visit anyone in the jail.



7. Maricopa County

Sheriff Joe Arpaio has made a cottage industry out of "fighting immigration," outlined in his book *Joe's Law: America's Toughest Sheriff Takes On Illegal Immigration, Drugs and Everything Else That Threatens America* (2008), on sale at Amazon.com as well as sheriff's offices throughout the county.

The sheriff also has county vehicles emblazoned to support the ad campaign.

Who should be spared from being asked their immigrant status?

Most of us do not carry our
passport or birth certificate,
even if we have one.

ty under federal law to enforce immigration criminal statutes, if state law authorized them to make arrests for federal crimes.⁸

The problem was, and is, that most immigration violations are not criminal but civil. For instance, it is not a *crime* to be an undocumented alien but a *civil* violation. Thus, the inherent authority argument had limited benefit to those seeking to enforce *civil* immigration law. Even the Department of Justice Office of Legal Counsel concluded in a 1996 memorandum that “State and local police lack recognized authority to stop and detain an alien solely on suspicion of civil deportability, as opposed to a criminal violation of the immigration laws or other laws.”⁹

Also, most local police agencies did not want to enforce federal immigration law because of the extra liability and headache of determining whether:

- a person has legal status,
- the warrant is for a civil or criminal immigration offense,
- their actions may be perceived as racial profiling,
- they are required to comply with the consulate notification requirements when a foreign national is arrested.

In fact, when Congress first passed 287(g) in 1996, permitting police to participate in immigration enforcement, no local police agency changed its enforcement practices. As the state cops saw

it, not only did the 287(g) program fail to reimburse local police, local enforcement of immigration law cut against community policing and effective law enforcement: What undocumented witness, for example, would come forward to testify or even report a serious crime when they fear local police will deport them?

The Feds Encourage the Program

Given the force multiplier effect, as well as some national politics, the Feds wanted to encourage more local police agencies to participate in immigration enforcement. In 2002, Attorney General Ashcroft retracted the 1996 memorandum and announced that local and state law enforcement had inherent authority to enforce civil immigration laws.¹⁰ However, his own Department of Justice refused to produce the legal opinion for the change in interpretation, and most state enforcement agencies hesitated to sign up.

Nonetheless, starting in late 2006 the 287(g) program enjoyed modest growth in localities where characterizations of immigrants as drains on society and hardened criminals carried political success.¹¹

The Program and Problems

In January 2009, the Government Accounting Office (GAO) found that ICE was not properly controlling the 287(g) program or supervising the local 287(g) men.¹² Without the statutorily required oversight, local police defined their own role with their own political interests in mind, often contradicting ICE’s objectives.¹³

For instance, ICE intended the 287(g) men to help prosecute



8. The International Association of Chiefs of Police 2007.

9. Assistance by State and Local Police in Apprehending Illegal Aliens, Office of Legal Counsel, Department of Justice, Feb. 5, 1996.

10. John Ashcroft



11. Entrance to the Fourth Avenue Jail in Phoenix, Maricopa County, Ariz., recruiting deputies to enforce immigration law.

12. GAO-09-109, *supra* note 3, at 4.

13. Maricopa County Sheriff Joe Arpaio explaining his expansive view of his role in enforcing immigration law.



LOOKING FORWARD


Any comprehensive immigration reform must include a clearer delineation between state and federal enforcement of immigration laws. Furthermore, the delineation must take into account how our national interest is best advanced when allocating resources between the two entities. Finally, all effective law enforcement knows it must establish priorities. In the immigration world, enforcing civil infractions rather than criminal acts is a decision that results in fewer resources available to combat serious crimes, including drug- and human-trafficking and the pursuit and apprehension of terrorists. A reformed immigration act must readjust the 287(g) power so that duplication is avoided and they rededicate their efforts to eradicate serious and dangerous criminals.

removable aliens committing serious crimes, such as a narcotics smuggling. Conversely, local police used their 287(g) men to process minor crimes, such as speeding and using fraudulent documents.

For example, the 160 (at last count) 287(g) men in Maricopa County spend their time enforcing state laws related to alien smuggling and targeting day-laborers, corn-vendors and people with broken tail-lights or cracked windshields.¹⁴

To give this perspective, imagine if the Internal Revenue

waiting for a friend to fetch it?

Could it be then that any one of us might not be too far from someday pleading, “Don’t shoot, 287(g) man; don’t shoot!” 

Service could turn local police into “G-Men” permitted to check the tax records of the driver and passengers when a cop stopped someone for a traffic violation—Americans would be outraged. Because race and nationality are often intertwined, the local 287(g) men all too easily run the risk of racial profiling. Who should be spared from being asked their immigrant status? Or more practically speaking, if a 287(g) man asked any one of us to prove that *we* were a citizen, how would *we* do it? Most of us do not carry our passport or birth certificate, even if we have one. How long would someone have to spend in jail



14. MCSO deputies in full SWAT regalia searching the Mesa City library in the early-morning hours for janitors working without documents on Oct. 17, 2008.